REPCO (MALAYSIA) SDN BHD

v.

TAN THO FATT & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S2-22-367-2001]
15 APRIL 2003

CIVIL PROCEDURE: *Trial - Right to begin - Early trial dates - Application for - Whether court may invoke its inherent powers to adjudicate application - Factors to be considered in ascertaining whether early trial dates should be ordered - Whether defendants estopped from applying for early trial dates*

CIVIL PROCEDURE: *Pleadings - Striking out - Striking out of averment on basis that it was untrue and scandalous - Whether allowed*

The defendants had applied by way of summons in chambers in encl. 50 for early trial dates in order to dispose off the action herein. In opposing the application, the plaintiff contended that there was no provision in the Rules of the High Court 1980 ('RHC') to allow the defendants to make the application. The plaintiff submitted that the appropriate time for the defendants to make the application in encl. 50 was during the pre-trial case management stage as envisaged under O. 34 r. 4(2)(n) of the RHC. The defendants argued on the contrary, contending that the court may exercise its inherent powers to order an early trial independent of the mechanism available under O. 34 r. 4(2) of the RHC.

Held:

[1] Order 92 r. 4 of the RHC governs the inherent powers of the court. In this instance, there was no remedy for the defendants in the event the court refused to exercise its inherent jurisdiction to fix early trial dates. Therefore, the court appropriately invoked its inherent powers in order to adjudicate the application in encl. 50. (pp 489 b & 496 e-f)

[2] Factual backgrounds are circumstances that ought to be taken into account in ascertaining whether early trial dates should be ordered. The plaintiff had instituted the present action against the defendants alleging that the defendants had committed breach of confidential information during their course of employment with the plaintiff. Subsequently, the plaintiff had

administered interrogatories and taken out interlocutory applications against the defendants. These disputes resulted in the prolonging of proceedings and caused substantial monetary expenditure on the part of the defendants while lowering the morale amongst the individual defendants and the employees of the subject companies. In view of the defendants' hardship, whether financial or otherwise, an early trial of this action was ordered. (pp 496 h, 497 a-f, 498 a-b, h & 499 a-b)

[3] Taking into account the plaintiff's unreasonable and misplaced use of the mechanism of interrogatories, any outstanding application against the defendants were not considered as a sufficient reason to prevent an order in terms of encl. 50. (pp 499 c, h & 500 a)

[4] Further, the defendants were not estopped from applying for early trial dates simply because they did not raise the issue of an early trial date at the previous pre-trial management dates. (pp 502 h & 503 a)

[5] By encl. 59, the plaintiff sought the leave of the court to strike out an averment of the defendants in encl. 58, on the grounds that they were untrue and scandalous. However, the matter would only have been struck out if it was scandalous, irrelevant and/or otherwise oppressive. Since the said averment was relevant and not scandalous or oppressive in nature, it was thus, not struck out. (pp 503 h & 504 b-c)

[Application granted.]

Case(s) referred to:

Austin v. Wildig [1969] 1 All ER 99 ***(refd)***

Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corporation [1981] 1 All ER 289 ***(refd)***

Chandra Sri Ram v. Murray Hiebert [1997] 3 CLJ Supp 518 HC ***(refd)***

Connelly v. Director of Public Prosecutions [1964] AC 1254 ***(refd)***

Cracknall v. Janson [1879] 11 Ch D 1 ***(refd)***

Davey v. Bentinck [1893] 1 QB 185 ***(refd)***

Dr Soo Fook Mun v. Foo Fio Na & Anor and Another Appeal [2001] 2 CLJ 457 CA ***(refd)***

Goddard v. Parr [1855] 24 LJ Ch 783 ***(refd)***

Kernick v. Kernick [1864] 12 WR 335 ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee) [1990] 1 MLJ 445 HC ***(refd)***

Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan [1990] 1 MLJ 317 HC ***(refd)***

MBf Finance Bhd v. Sri-Hartamas Dvpt Sdn Bhd [1992] 1 CLJ 160; [1992] 3 CLJ (Rep) 55 HC ***(refd)***
Montreal Trust Co v. Churchill Forest Industries (Manitoba) Ltd [1971] 4 WWR 542 ***(refd)***
MUI Bank v. Alkner Investment (Pte) Ltd [1990] 3 MLJ 385 ***(refd)***
Ngan Tuck Seng v. Ngan Yin Groundnut Factory Sdn Bhd [1999] 3 CLJ 26 HC ***(refd)***
Osmaston v. Assn of Land Finances [1878] WN 101 ***(refd)***
Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***
Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC ***(dist)***
R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Rossage v. Rossage [1960] 1 WLR 249 ***(refd)***
Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor [1997] 1 CLJ 775 HC ***(refd)***
Suppuletchimi Karpaya v. Palmco Bina Sdn Bhd [1994] 2 CLJ 561 HC ***(refd)***
Taylor v. AG [1975] 2 NZLR 675 ***(refd)***
The Motor Emporium v. Arumugam [1933] MLJ 276 ***(refd)***
The Venus Destiny [1980] 1 All ER 718 ***(refd)***
Willis v. Earl Beauchamp [1886] 11 PD 59 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218, 243(1)
Courts of Judicature Act 1964, s. 25(1)
Rules of the High Court 1980, O. 26, O. 34 r. 4(2)(n), O. 41 r. 6, O. 92 r. 4

Other source(s) referred to:
Jacob's The Inherent Jurisdiction of the Court, [1970] 23 Current Legal Problems

For the plaintiff - Justin Voon (Tiffany Lim); M/s Cheah Teh & Su
For the 1st, 3rd, 4th, 8th & 9th defendants - Maidzuara Mohammed (Vijay Raj); M/s Logan Sabapathy & Co
For the 2nd, 5th, 6th & 7th defendants - KS Law; M/s Shook Lin & Bok

Reported by Raja Vishnu Sivarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was the joint application by way of a summons in chambers in encl. 50 of the first, third and fourth defendants ("individual defendants") and the eighth and ninth defendants ("subject companies") for early trial dates for the disposal of the action herein. That encl. 50 was worded in this way:

(1) that early trial dates be fixed for the disposal of the action herein;

(2) that the costs of and occasioned by this application be costs in the cause; and

(3) that such further or other orders or directions be made or given as this Honourable Court deems fit and just in the circumstances.

From henceforth, the individual defendants and the subject companies shall be referred to as the "defendants".

In support of encl. 50, the defendants relied on the affidavits of Siew Choon Wah that were affirmed on 27 December 2001, 22 January 2002 and 18 February 2002 as reflected in encls. 49, 55 and 58 respectively. The plaintiff vehemently opposed encl. 50 and the plaintiff relied on the affidavits of Yeow Ewe Chuan that were affirmed on 10 January 2002, 4 February 2002 and 4 March 2002 as seen in encls. 54, 56 and 59 respectively.

The defendants were fortunate. Their application in encl. 50 was supported by the second, fifth, sixth and seventh defendants – hereinafter referred to as "the other defendants". The defendants have, incidentally, given notice of encl. 50 to the other defendants.

The Chronology Of Events

The defendants were concerned with the delay in obtaining the trial dates. The interlocutory applications filed by the plaintiff must have been stifling. But interlocutory applications continue to be filed by the legal practitioners in our courts on a daily basis and the courts continue to adjudicate on them. Indeed the importance of interlocutory applications can never be denied and I too had said that in *Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor* [1997] 1 CLJ 775 at pp. 781-782:

> This case demonstrates, once again, the agility of counsel to manoeuvre through the RHC in order to obtain the desired result. Interlocutory applications are varied and manifold in our courts. These interlocutory applications, though at times stifling, yet they are necessary evils. They serve to warn the opposing party of the need to be vigilant and not caught off guard. They serve as an intellectual outlet for the agile and the robust. The converse would be true. Those caught off guard would pay dearly for their folly. For the Courts, these interlocutory applications would continue to play dominant roles for a long time to come. Indeed interlocutory applications are invariably necessary in order to deal with the rights of the parties in the interim period between the commencement of the proceedings and their final determination. These interlocutory applications would move the courts to grant such interim reliefs or remedies as may be just or convenient. These reliefs or remedies

are designed to achieve one or more of several objectives, for instance, to maintain the *status quo ante*, to prevent hardship or prejudice to one or other of the parties, to preserve a fair equilibrium between the parties and at the same time to give them due protection while awaiting the final outcome of the proceedings, and last but by no means least, to prevent any abuse of process during the interim period.

It would certainly be useful to list out the chronology of events in order to ascertain the concerns of the defendants in wanting early trial dates to be fixed for this action. The chronology of events are as follows:

Date	Event
17.5.2001	Writ and Statement of Claim filed by the Plaintiff.
5.7.2001	Memorandum of Appearance filed and served by the 1st, 3rd, 4th ('Individual Defendants'), 8th and 9th Defendants ('Subject Companies').
26.7.2001	Individual Defendants' and Subject Companies' Defence filed and served.
9.8.2001	Plaintiff's Reply to Individual Defendants' and Subject Companies' Defence filed and served.
23.8.2001	Interrogatories administered against Individual Defendants and Subject Companies.
24.8.2001	Close of Pleadings.
	Interrogatories administered against 2nd, 5th, 6th and 7th Defendants ('Other Defendants').
7.9.2001	Other Defendants' application to set aside the Interrogatories administered against them (Enclosure 17) filed.
10.9.2001	Plaintiff takes out Notice for Pre-Trial Case Management (Enclosure 19).
17.9.2001	Plaintiff's application for, inter alia, an extension of time to serve the Interrogatories administered against the Other Defendants and/or in the alternative, for leave of Court to serve the said Interrogatories filed out of time (Enclosure 20).

18.9.2001	1st Hearing date of Notice for Pre-Trial Case Management.
	Court recorded the Plaintiff's consent to allow Interrogatories administered against the Other Defendants to be stood over pending disposal of Enclosures 17 and 20.
	Enclosures 17 and 20 adjourned for hearing on 21.11.2001 before the Learned Judge.
	Notice for Pre-Trial Case Management fixed for mention on 21.11.2001.
21.9.2001	Individual Defendants' and Subject Companies' Answers to Interrogatories filed and served.

Date	**Event**
28.9.2001	Other Defendants' application for Further and Better Particulars (Enclosure 32) filed.
15.10.2001	Plaintiff's application for Further Answers to Interrogatories against Individual Defendants and Subject Companies (Enclosure 33) filed.
7.11.2001	Hearing of Enclosures 32 and 33 before the Learned Deputy Registrar. Hearing of both Enclosures adjourned pending the filing of the respective Affidavits in Reply.
	Hearing of Enclosure 32 adjourned to 23.1.2002.
	Hearing of Enclosure 33 adjourned to 31.1.2002.
21.11.2001	Court recorded Plaintiff's consent to allow Interrogatories administered against the Other Defendants to be stood over pending disposal of Enclosures 17 and 20.
	Hearing of Enclosures 17 and 20 adjourned upon request by Plaintiff and the Other Defendants pending negotiations on, *inter alia*, issues raised therein.
	The matter is fixed for further mention on 10.12.2001 for parties to inform the Court of the outcome of the said negotiations.
10.12.2001	Court recorded Plaintiff's consent to allow the Interrogatories administered against the Other Defendants to be stood over pending disposal of Enclosures 17 and 20.

	Plaintiff's and Other Defendants' solicitors informed the Learned Judge that the abovesaid negotiations were not fruitful.
	The Learned Judge further directed Enclosures 17, 20, 32 and 33 to be taken together and heard before the Deputy Registrar on 31.1.2002.
	Matter fixed for further Case Management on 7.5.2002.
28.12.2001	Individual Defendants' and Subject Companies' application for early trial (Enclosure 50) filed.
23.1.2002	Hearing of Enclosure 32 vacated pursuant to the Learned Judge's directions on 10.12.2001.
31.1.2002	Hearing of Enclosures 17, 20, 32 and 33 before the Learned Deputy Registrar.
Date	**Event**
	Hearing of all Enclosures adjourned to 7.2.2002 as the Learned Deputy Registrar was on leave.
7.2.2002	Hearing of Enclosures 17, 20, 32 and 33 before the Learned Deputy Registrar.
	Hearing of all Enclosures adjourned to 20.3.2002 at Plaintiff's request as Plaintiff's counsel was engaged in another matter.
20.3.2002	Hearing of Enclosures 17, 20, 32 and 33 before the Learned Deputy Registrar.
	Counsel for the Other Defendants informed the Court that they have since made some proposals to the Plaintiff's solicitors in relation to Enclosures 17, 20 and 32. Plaintiff's solicitors informed the Court that they require time to obtain their client's instructions.
	Court thus fixed Enclosures 17, 20, 32 and 33 for hearing on 11.4.2002.
11.4.2002	Hearing of Enclosures 17, 20, 32 and 33 before the Learned Deputy Registrar.
	The Plaintiff and the Other Defendants have reached a consensus wherein the Other Defendants shall withdraw Enclosure 17 and the Plaintiff shall withdraw prayer (1) of Enclosure 20.

Court recorded that Enclosure 17 be struck off with no liberty to file afresh and with no order as to costs (with parties' consent).

Court also recorded that prayer (1) of enclosure 20 be struck off with no order as to costs (with parties' consent).

Plaintiff and Other Defendants are to attempt to reach a consensus in respect of the outstanding positions of the remaining prayers in Enclosures 20 and 32.

Enclosures 20, 32 and 33 are fixed for mention on 3.5.2002.

3.5.2002 Mention of Enclosures 20, 32 and 33 before the Learned Deputy Registrar.

Plaintiff's and Other Defendants' solicitors request for further time to reach a consensus in respect of the outstanding positions of the remaining prayers in Enclosures 20 and 32.

Enclosures 20, 32 and 33 fixed for further mention on 3.6.2002.

Date	Event
7.5.2002	Hearing of Enclosures 19 and 50.
	Court adjourned Enclosure 19 for mention on 13.8.2002 and Enclosure 50 was also adjourned to the same date for hearing, in order to await the outcome of the pending interlocutory applications.
3.6.2002	Mention of Enclosures 20, 32 and 33.
	In relation to Enclosures 20 and 32, the Court, with the agreement of the parties, struck off certain questions and adjourned the same for mention on
	In relation to Enclosure 33, the Court also adjourned the same for mention on 2.7.2002 to enable the Plaintiff's solicitors to obtain instructions from their client regarding the possibility of withdrawing certain questions.
2.7.2002	Mention of Enclosures 20, 32 and 33.
	In relation to Enclosure 33, the Plaintiff withdrew certain questions whereupon the Court struck out its corresponding answers. Matter adjourned to 16.7.2002 to enable Plaintiff to file amended application.

	Court also fixed 16.7.2002 for mention of Enclosures 20 and 32.
16.7.2002	Mention of Enclosures 20, 32 and 33.
	Matters adjourned to 26.7.2002 as Deputy Registrar was on emergency leave.
26.7.2002	Mention of Enclosures 20, 32 and 33.
	Court gave directions for written submissions to be filed in relation to the said Enclosures as follows:-
	(a) applicant in relation to the said Enclosures to file written submissions by 27.9.2002;
	(b) party opposing the said Enclosures to file their submissions in reply by 29.11.2002;
	(c) applicant to file reply by 27.12.2002; and
	(d) 20.1.2003 fixed for clarification in relation to the said Enclosures.
13.8.2002	Mention of Enclosure 19 and hearing of Enclosure 50.
	Court directed all outstanding interlocutory applications to be disposed off first before proceeding with the above Enclosures.
Date	**Event**
	Enclosure 50 was therefore adjourned to 27.1.2003 for hearing and Enclosure 19 was adjourned to the same date for mention.
30.9.2002	Plaintiff lodges and serves written submissions in support of enclosure 33 (subsequently amended where the amended application is Enclosure 61).
29.11.2002	Individual Defendants' and Subject Companies' lodge and serve written submissions dated 29.11.2002 opposing Enclosure 61.
27.12.2002	Plaintiff lodges and serves submission in reply dated 27.12.2002 in support of Enclosure 61.
20.1.2003	Clarification of Enclosures 20, 32 and 33 before SAR and SAR to check on submissions. To 27.1.03 for mention.

27.1.2003	Mention Enclosures 20, 32 and 33. To 31.1.2003 for mention as SAR on leave.
27.1.2003	Mention Enclosure 19 before Deputy Registrar. Directions given. To 24.7.03 for further mention.
27.1.2003	Hearing Enclosure 50 before Deputy Registrar. To 15.4.2003 for Hearing. Written submissions to be filed on 1.4.2003.
31.1.2003	Mention Enclosures 20, 32 and 61 before SAR. To 21.3.2003 for clarification as SAR on leave.
21.3.2003	Clarification – Enclosures 20, 32 and 61 before SAR. To 28.3.2003 for mention as written submissions not in court file.
28.3.2003	Mention Enclosures 20, 32 and 61. Vacated. To 3.4.2003 for mention.
1.4.2003	Mention Enclosure 50 before Deputy Registrar. Written submissions filed in court.
3.4.2003	Mention Enclosures 20, 32 and 61 before SAR. All matters adjourned to 14.4.03 as SAR on emergency leave.
14.4.2003	Mention Enclosures 20, 32 and 61 before SAR. Enclosures 20 and 32 fixed for decision on 22.5.03. Enclosure 61 fixed for mention as written submissions not located.

Of crucial importance to note would be the following dates (relevant to the defendants only):

(1) That the writ and the statement of claim were filed on 17 May 2001.

(2) The defendants' statement of defence filed and served on 26 July 2001.

(3) The plaintiff's reply to the defendants' statement of defence filed and served on 9 August 2001.

(4) The pleadings are deemed closed on 24 August 2001.

(5) The defendants filed the application for early trial dates in encl. 50 on 28 December 2001.

(6) That this court heard encl. 50 on 15 April 2003 and gave its decision forthwith.

It can be said that by looking at the chronology of events, there was indeed a chequered history of the action herein.

Inherent Jurisdiction Of The Court – The Power To Order An Early Trial

Mr. Justin Voon, the learned counsel for the plaintiff, pointed out that there is no provision in the Rules of the High Court 1980 ("RHC") to allow the defendants to make the application as per encl. 50. Rather, according to him, the appropriate time for the defendants to make the application in encl. 50 would be during the pre-trial case management stage as envisaged under O. 34 r. 4(2)(n) of the RHC. He submitted that the court's discretion to fix the trial dates would be during the pre-trial case management stage and not pursuant to an application by way of a summons in chambers as seen in encl. 50. He pointed out that the plaintiff had applied for a pre-trial case management date by virtue of its notice to attend the pre-trial case management dated 10 September 2001. He submitted that the defendants could not rely on O. 92 to ground their application in encl. 50 because of the specific provision as set out in O. 34 of the RHC. He then cited the case of *Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244, a decision of the Supreme Court with a coram of Lee Hun Hoe CJ (Borneo), Seah & Syed Agil Barakbah SCJJ, and the judgment of the then Supreme Court was delivered by Syed Agil Barakbah SCJ who at p. 181 said that where "the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers". He too cited the case of *MBf Finance Bhd. v. Sri-Hartamas Dvpt. Sdn. Bhd.* [1992] 1 CLJ 160; [1992] 3 CLJ (Rep) 55, a decision of Dato Dr. Zakaria Yatim J (as he then was) and there his Lordship said at p. 170 of the report that since the liquidator could apply for a stay under s. 243(1) of the Companies Act 1965, it would not be proper for his Lordship to invoke the inherent jurisdiction of the court. His Lordship also said at the same page of the report that "in practice once a winding-up order is made, a stay is never granted because it interferes with the liquidator's duty and power." He also cited the case of *Malayan United Finance Bhd, Johore Bahru. v. Liew Yet Lan* [1990] 1 MLJ 317, a decision of VC George J (as he then was), in particular to a passage appearing at p. 320 of the report where his Lordship said:

> What is to be gleaned from this is that the policy and effect of the above rules is that the general rule is that all applications in chambers have to be made by summons *inter partes* other than applications specifically excluded by the rules from being so brought. Accordingly, there not being any provision anywhere which allows applications for extension of time to be made by an ex parte summons, it is my view that having encl. 61 heard as an *ex parte* application was hearing the application by procedure independent of the Rules

of High Court 1980 and as such the order made is a nullity – see *Anlaby & Ors v. Pretorius* [1888] 20 QBD 764 at pp. 769-771 and *Syarikat Joo Seng & Anor v. Habib Bank Bhd* [1986] 2 MLJ 129 at p. 131.

And so he submitted that there is no "procedure independent of the RHC" to support the defendants' application in encl. 50.

In rebuttal, Madam Maidzuara Mohammed, the learned counsel for the defendants, submitted that the court may exercise its inherent powers to order an early trial independent of the mechanism available under O. 34 r. 4(2) of the RHC. Indeed that was an interesting submission. Order 92 r. 4 of the RHC governs the inherent powers of the court and it states as follows:

4 Inherent powers of the Court (O. 92 r. 4)

For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

Then, there is s. 25(1) of the Courts of Judicature Act 1964 (Act 91) (Revised 1972) where it enacts as follows:

25 Powers of the High Court

(1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by a written law in force within its local jurisdiction.

So, it can be surmised that even the Courts in Malaya prior to Malaysia day were vested with the powers of its inherent jurisdiction as alluded to in the judgment of Terrell, Ag. CJ in the case of *The Motor Emporium v. Arumugam* [1933] MLJ 276 and there at the headnote it is reported that:

Although there is no Civil Law Enactment, incorporating into the law of the Federated Malay States the equitable principles applied in England; yet under the provisions of section 49 (i) of the Courts Enactment, the Supreme Court has the widest possible jurisdiction in all suits matters and questions of a civil nature, and has inherent jurisdiction to apply such principles of natural justice as are necessary or desirable.

Proceeding ahead, there is also the case of *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, a decision of the Federal Court with a coram of Eusoff Chin Chief Justice, Edgar Joseph Jr and Wan Yahya FCJJ. Delivering the judgment of the Federal Court, Eusoff Chin, Chief Justice of Malaysia in style said at p. 166 to p. 168 of the report:

I cannot find any provision in the Courts of Judicature Act 1964, the Rules of the High Court 1980 or the Act expressly or impliedly prohibiting the High Court from granting any relief as provided for in the Act when quashing an Award of the Industrial Court. The court cannot override an express provision of the law, but if there is no express provision in the statute, then the court can exercise its powers in a suitable case. This is precisely the approach taken by the Federal Court in *Zainal Abidin v. Century Hotel* [1982] 1 MLJ 260, where it relied upon para 6 of the Schedule to found the mareva jurisdiction.

I should go further and consider the provisions of O. 92 r. 4 of the Rules of the High Court 1980 which provides:

> 4 For the removal of doubts, it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the High Court to make any order as may be necessary to prevent an abuse of the process of the court.

In *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; ([1984] 2 CLJ (Rep) 319) at p. 59 (p. 324) Edgar Joseph Jr SCJ held:

> … It is also clear that the inherent jurisdiction of the court includes all the powers that are necessary 'to fulfill itself as a court of law, to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner': Jacob, *The Inherent Jurisdiction of the Court* [1970] 23 Current Law Problems 23 at pp 27 and 28.

In *Re Dunlop Estate Bhd v. All Malayan Estates Staff Union* [1980] 1 MLJ 249 at 246, Azmi J (as he then was) held:

> In my view, having regard to the principles enunciated in the cases cited, the Industrial Relations Act, being a social legislation enacted with the prime object of attaining social justice and industrial peace, demands practical and realistic interpretation whenever necessary, for the purpose of maintaining good relationship and fair dealings between employers and workers and their trade union, and the settlement of any differences or disputes arising from their relationship.

In *Nothman v. Barnet London Borough Council* [1978] 1 WLR 220 at p 228, in a case involving an industrial relations matter of unfair dismissal, Lord Denning held:

> … Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach.' … In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose' underlying the

> provision. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.

Section 33B(1) (previously s. 29(3)(a)) of the Act provides that an Award of the Industrial Court shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called in question in any court of law. Yet, our High Courts and Federal Court intervene to quash the Awards of the Industrial Court in appropriate cases, all for the cause of justice. Therefore, even when the statute declares an Award is final, the courts can still intervene. (See *Sungai Wangi Estate v. Uni* [1975] 1 MLJ 136). Similarly, in *Minister of Labour, Malaysia v. National Union of Journalists, Malaysia* [1991] 1 MLJ 24, where the Minister had refused to refer a trade dispute to the Industrial Court under s. 26(2), the Supreme Court when upholding the decision of the High Court granting *certiorari* to quash the decision of the Minister, did not order the Minister to reconsider the matter de novo but instead arrogated itself the powers of the Minister and granted the relief to the workman by directing the Minister to refer the trade dispute to the Industrial Court.

It is clear that the High Courts and the Federal Court have adopted a liberal and progressive approach in *certiorari* proceedings, and I find that where the particular facts of the case warrant it the High Court should endeavour to remedy an injustice when it is brought to its notice rather than deny relief to an aggrieved party on purely technical and narrow grounds. The High Court should mould the relief in accordance with the demands of justice.

MP Jain and SN Jain in *Principles of Administrative Law* (4th edn, 1993) at pp. 547 and 548 stated:

> In recent years the courts have not looked upon their task in such a mechanical manner and have tended to mould their relief according to the exigency of the situation. They have tried to tailor the relief in accordance with the demands of justice in the circumstances of the specific case, lay down guidelines, go into the merits, and even at times to dilute the logical consequences of their own ruling on the law.
>
> In a few cases the Supreme Court, while quashing a disciplinary order on account of failure of natural justice, prohibited a fresh hearing by the authority and ordered reinstatement. Recently, in *AL Kalra v. Project & Equipment Corp of India Ltd* AIR 1984 SC 1361, the court quashed the dismissal order and ordered reinstatement … . In *Grindlays Bank v. ITO* AIR 1980 SC 656, the court not only quashed the assessment order but also issued directions to make a fresh assessment in the circumstances of the case.

> There are a number of instances where the Supreme Court has played this kind of affirmative role. In *Gujarat Steel Tubes v. Mazdoor Sabha* AIR 1980 SC 1896, the arbitrator's Award in a labour dispute having been found to be invalid as it suffered from a fundamental flaw, the court itself proceeded to fashion the relief to be given to the discharged workers keeping in view the dictum that 'law is not dogmatics but pragmatics'. In *Azad Rickshaw Pullars Union v. Punjab* AIR [1981] SC 14, the court itself framed a scheme so that the provisions of a statute meant for the benefit of rickshaw pullers could be made workable … .
>
> As earlier stated, the claimant is 51 years old and has been jobless for the last seven years. Owing to his unemployment, he and his family with school-going children are suffering immense hardship. Should we remit this case back to the Industrial Court? To do this will certainly involve continued and prolonged litigation which will do great harm and injustice to the claimant, and were he to die, his claim will abate as was held in *Thien Tham Sang v. United States Army Medical Research Unit & Anor* [1983] 1 MLJ 97, and this will result in his family suffering grave injustice.

I venture to say that even a Company's Court – which is the High Court, is vested with the inherent jurisdiction to strike out the petition that is presented under s. 218 of the Companies Act 1965 (*Ngan Tuck Seng v. Ngan Yin Groundnut Factory Sdn Bhd* [1999] 3 CLJ 26).

I marvel at the phrase "the inherent jurisdiction of the court". It is a phrase that has provoked the minds of many people – judges and authors alike. Judges would use this phrase to assist litigants in the course of the proceedings. Authors, on the other hand, would write high praises about the phrase (see *Jacob's The Inherent Jurisdiction of the Court* (1970) 23 Current Legal Problems). It cannot be denied that the courts are entitled to exercise its inherent jurisdiction in many ways and even to the extent of resolving matters that are regulated by statute or the rule of court (*Willis v. Earl Beauchamp* [1886] 11 PD 59 at 63, CA; and *Davey v. Bentinck* [1893] 1 QB 185 at 187, 188, CA). The inherent jurisdiction of the court would always allow the court to fulfil its role, properly and effectively, as an effective court of law for the citizens to seek their legal redress (*Connelly v. Director of Public Prosecutions* [1964] AC 1254 at 1301, [1964] 2 All ER 401 at 409, HL). Lord Diplock, in style, said in the case of *Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corporation* [1981] 1 All ER 289 at 295, [1981] 2 WLR 141 at 147, HL that it would be conducive to clarity if the use of expressions like "inherent power" and "inherent jurisdiction" of the High Court were confined strictly to the doing by the court of acts which it needs to do and which must

have the power to do in order to maintain its character as a court of justice. The distinguishing feature of the inherent jurisdiction of the court is said to be its procedural nature which is readily exercisable by summary process. Every party to a litigation is entitled to rely on the phrase and seeks the court's mercy to invoke its inherent jurisdiction. It is appropriate to say and I so say that the inherent jurisdiction of the court is a viable and flexible doctrine. It is the reserve power or the residual power of the court wherein the court may draw upon it in order to arrive at a just decision. The court will also rely on that residual power in order to ensure the observance of the due process of the law or to prevent oppression or to do justice between the parties and to secure a fair trial between the parties in the course of litigation (*Montreal Trust Co v. Churchill Forest Industries (Manitoba) Ltd* [1971] 4 WWR 542 at 548; 21 DLR (3d) 75 at 81 (Man. CA); and *Taylor v. A.G.* [1975] 2 NZLR 675 (NZ CA)). It is also recommended to read the case of *The Venus Destiny* [1980] 1 All ER 718; [1980] 1 WLR 460.

I will now refer to the case of *Austin v. Wildig* [1969] 1 All ER 99. That was a case where the plaintiff by the name of Gladys Hilda Austin by a notice of motion dated 11 November 1968 sought to fix a date for a speedy trial of her action against the defendant by the name of Thomas Henry Wildig. I will now reproduce verbatim what transpired before Plowman J, and this can be seen at p. 99 to p. 100 of the report:

> At the hearing before PLOWMAN, J, counsel for the plaintiff said: 'The defendant's writ is now more than twelve months old but there is nothing to stop him from taking out another writ which would prevent a sale by the plaintiff. The plaintiff's writ and statement of claim asks the court for a declaration, but this remedy (which is the primary remedy sought by the plaintiff in this case) is not available on a motion for judgment by default: *Williams v. Powell* ([1894] WN 141) where KEKEWICH, J, said that the court first had to be satisfied by evidence. That statement had not been repeated so sweepingly in later cases: (see *Grant v. Knaresborough Urban District Council* ([1928] Ch. 310); *New Brunswick Ry. Co. v. British & French Trust Corpn., Ltd.* ([1938] 4 All ER 747; [1939] AC 1.) and *Nagy v. Co-operative Press, Ltd.* ([1949] 1 All ER 1019; [1949] 2 KB 188)). Since the remedy wanted is not available on a motion for judgment in default of defence, the plaintiff has elected to proceed to trial as she is entitled to do: *Grant v. Knaresborough Urban District Council* ([1928] Ch. 310); *Nagy v. Co-operative Press, Ltd.* ([1949] 1 All ER 1019; [1949] 2 KB 188). The question is how to proceed to trial. The Rules of the Supreme Court seem to be defective. What the plaintiff wants to do is to take out a summons for directions, as directed by O. 25 r. 1(1), but the pleadings are not closed because there has been no defence, and there has been no discovery. Order 25, as a matter of

> language, gears the summons to the pleadings. Order 19 r. 7, provides a form of procedure in default of defence which is permissive only, and would not be satisfactory in this case. Under the inherent jurisdiction of the court the plaintiff can apply for directions as to the trial: *Nagy v. Co-operative Press, Ltd.* ([1949] 1 All ER 1019; [1949] 2 KB 188). It is true that in *Nagy v. Co-operative Press, Ltd* this application was in fact made by issuing a summons for directions as if the pleadings had closed; but the judgments in that case leave considerable doubt whether that was procedurally correct. In face of that procedural uncertainty, the plaintiff prefers to rely on the inherent jurisdiction; therefore, directions are asked for on the fixing of a date for trial, without discovery, in London, before a judge without a jury, in accordance with O. 34 r. 2(1). Leave is also asked under O. 20 r. 1 to amend the writ.

At p. 100 of the report, the judgment of Plowman J, appears and I will reproduce that judgment now:

> PLOWMAN, J: I will order that the action be set down for trial in Part 1 of the list; not to come on before Dec. 14, 1968; certify for a speedy trial; trial to be in London before a judge alone. I give leave to amend the writ, as asked, without re-service.
>
> Order accordingly.

I will also refer to a passage that appears in the judgment of Edgar Joseph Jr. J (as he then was) in the case of *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319, and this very passage was cited favourably by Chief Justice Eusoff bin Chin in the case of *R. Rama Chandran v. The Industrial Court of Malaysia & Anor (supra)* as reproduced earlier. In that passage Edgar Joseph Jr. J (as he then was) said that the court should apply its inherent jurisdiction in the course of administering justice.

This would be followed by the case of *Suppuletchimi a/p Karpaya v. Palmco Bina Sdn Bhd* [1994] 2 CLJ 561, a decision of Vincent Ng Kim Khoay J. At p. 567 of the report, his Lordship had this to say:

> As many of the rules are framed to prevent injustice in particular situations, the court may exercise its inherent powers concurrently or in the alternative. For example, apart from the specific grounds in the rules on which a court may order the endorsement on a writ or a pleading to be struck out under Order 18 r. 19 of RHC, the court may so order on the basis of its inherent powers.

Madam Maidzuara Mohammed, the learned counsel for the defendants, continued with her submissions. This was what she submitted:

> The fixing of trial dates is an important power, without which the rights of the litigants could never be set down for final determination. Contrary to the plaintiff's contention, such an important and primary power cannot be limited in its exercise so as to be utilised only at the pre-trial case management stage. The possibility of such pre-trial case management dates being far apart or set for a time which is a long way off shows, at once, the magnitude of the problem which could be faced if the plaintiff's contention is correct.
>
> In view of the above, the court is not only entitled to fix trial dates by recourse to its inherent jurisdiction, but is in fact obliged to do so in order to avoid injustice, especially since active steps have been taken vide the present application.

She then relied on two authorities. One, a decision of VC George J, in the case of *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445. The other, a decision of Low Hop Bing J, in the case of *Chandra Sri Ram v. Murray Hiebert* [1997] 3 CLJ Supp 518. In the former case, VC George J, said at p. 446 to p. 447 of the report:

> He went on to argue that in his view, where the rules make no provision for a situation, the inherent power cannot be invoked unless it can be implied that the rules were intended to provide for the situation but had failed to do so. He then appears to have contradicted himself by submitting that the inherent power can only be used where there is a lacuna in the face of the rules which causes a procedural injustice.
>
> If O. 32 r. 6 cannot be applied in an O. 49 situation, then we have a situation of 'a lacuna in the face of the rules which causes a procedural injustice' in that it cannot be said the 'rules contain provision making available sufficient remedies'. In my judgment, in that kind of situation and if there is injustice, the court is not only entitled to but is obliged to make any order as may be necessary to prevent the injustice.
>
> In the instant case, O. 32 r. 6 gives the court the jurisdiction to set aside the *ex parte* order absolute. Alternatively, if O. 32 r. 6 is not applicable to an O. 49 situation, then the court has the jurisdiction to set aside the order invoking its inherent jurisdiction. I will now hear arguments on the merits.

In the latter case, Low Hop Bing J, said at p. 537 of the report:

> In an adversary system which is practiced in the Malaysian courts, the speed at which a case is heard is very much in the hands of the parties – because the parties can at any time apply to the court for an early hearing date. To an indolent and uninitiated party, his enthusiasm in wanting to apply for an early date may well be lackadaisical or non-existent. Our court, in such a case, is a referee who is non-partisan and who does not actively participate in the legal battle. Hence, in the absence of an application by any of the parties, the court would not of its own volition give an early hearing date.

Reverting back to the case of *Permodalan MBF Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244, I have this to say. Factually speaking that case can be distinguished from the present case. In that case, there was an obvious remedy which did not justify the court's exercise of its inherent jurisdiction. That remedy was in the form of an application to set aside the interim injunction that was granted therein. At p. 35 (p. 247) his Lordship Syed Agil Barakbah SCJ explained it in this way:

> We read this to mean that the rules cannot interfere with the exercise of the inherent powers by the court so long as it deems it necessary to prevent any injustice or any abuse of its own process. It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers. The most obvious remedy available in this case was the application to set aside the interim injunction which ought to have been heard early *in lieu* of the application to suspend the injunction. That is because an *ex parte* injunction is usually required immediately and such application will not be granted unless it is made by the plaintiff promptly. In normal practice, an early date is fixed for the inter-party hearing for the purpose of injunction until the trial of the action. Similarly, the court should be prompt in exercising its discretionary power to set aside an order made *ex parte* under Order 32 rule 6 RHC. Delay would defeat the real purpose of the rule.

But the facts of the present case do not provide any remedy to the defendants in the event the court refuses to exercise its inherent jurisdiction to fix early trial dates. It is currently not open to the defendants to apply to set the matter for an early trial during the case management stage.

By way of a summary, it is appropriate to say that this court would invoke its inherent powers in order to adjudicate the joint application in encl. 50.

Should I accede to the prayers as sought for in encl. 50? That would be the crucial question to pose.

What Are The Circumstances Justifying An Order For An Early Trial?

For this exercise, I must refer to the affidavit of Siew Choon Wah ("Siew") that was affirmed on 27 December 2001 as seen in encl. 49. In that affidavit, Siew deposed as to the status of the suit between the plaintiff and the defendants. Siew averred that the plaintiff instituted the present action against the defendants on 17 May 2001 with the main cause of action predicated upon the breach of confidential information which information the plaintiff alleged was obtained by the individual defendants collectively and or individually during the course of their employment with the plaintiff. Siew also averred that the

subject companies had conspired with the other defendants including the individual defendants to perpetrate the alleged wrongdoings against the plaintiff. Siew then deposed as follows:

(1) That the pleadings were deemed closed on 24 August 2001.

(2) That the plaintiff had also administered interrogatories against the defendants on 23 August 2001. That the defendants have answered the interrogatories as seen in their respective answers to the interrogatories dated 21 September 2001.

(3) That since that time, the plaintiff had made an application against the defendants for further answers to the interrogatories by way of a summons in chambers dated 15 October 2001 as seen in encl. 33 which has now been fixed for hearing on 31 January 2002.

(4) That in the meantime, the plaintiff had taken out the notice of pre-trial case management dated 10 September 2001 which came up for hearing on 18 September 2001, 21 November 2001 and 10 December 2001.

(5) That the next date for pre-trial case management was scheduled on 7 May 2002 pending the hearing of the various applications including the one that was taken out by the plaintiff.

(6) That, in all the circumstances of the case, the interlocutory applications taken out by the plaintiff must be viewed with circumspection. That the circumstances of the case and the timing of the applications only lead to one result, namely, that the prosecution of the action herein will be prolonged and which would eventually defeat the ends of justice which in turn would result in material prejudice and hardship – be it financial or otherwise, to the defendants.

Madam Maidzuara Mohammed submitted that the next pre-trial case management date would be on 4 July 2003. She also pointed out that on 27 January 2003 there was another pre-trial case management where the case management court ordered that the bundle of documents and the filing of pleadings, etc, etc, to be done. Of pertinence would be the submissions of Madam Maidzuara Mohammed to the effect that the plaintiff's company is currently undergoing re-structuring and that the exercise at re-structuring is still continuing and that the plaintiff is currently being managed by special administrators. Whereas she said, by comparison, the eighth and ninth defendants' companies are still strong and an on-going concerns.

These factual backgrounds are certainly circumstances that this court must take into account in ascertaining whether this court ought to order early trial dates. It would certainly be in the interest of justice for all parties concerned that an early trial of this action be ordered. It was rightly averred by Siew in his affidavit in encl. 49 that since the commencement of this action, the defendants were subjected to hardship – be it financial or otherwise. Siew then proceeded to itemise the untold hardship in these fashions:

(a) that there were extensive queries by the financiers of the subject companies and there were also additional financial obligations imposed on the subject companies by reason of the present action;

(b) that the subject companies form part of a group of companies headed by a listed vehicle known as A & M Realty Berhad. Quite apart from the disclosure requirements imposed upon A & M Realty Berhad, it too had received similar extensive queries pertaining to the present action. Whilst it is not possible to minutely measure the effect which this action has had on the subject companies or the group as a whole, yet to some extent it has caused the lowering of investors' confidence in the group including the subject companies;

(c) that it had created adverse publicity with consequent negative implications on the credit worthiness of the subject companies;

(d) that it had lowered the morale of the subject companies employees' and it had intensified, unnecessarily, the austerity drive of the employees and the individual defendants;

(e) that it had hampered the potential of the subject companies in enhancing and developing further its vehicle spare parts industry; and

(f) that in the interest of justice, a speedy trial will ensure that relevant and cogent evidence will be secured from potential witnesses for the defendants.

Now, given the competitive nature of the vehicle spare parts industry, the present suit ought to be expedited. The continuing hardship suffered by the defendants – be it financial or otherwise, would cause more prejudice and could not be compensated by an order of costs made in their favour.

Siew's affidavit was certainly thought provoking. It gave an insight into the difficulties faced by the defendants. It is quite plain and rather obvious that the prolonging of the proceedings and, with respect, the plaintiff's oppressive use of interrogatories which are currently pending would, as a matter of natural consequence, result in the incurring of substantial monetary expenditure on the

part of the defendants including, if I may be allowed to say, the lowering of the morale amongst the individual defendants and the employees of the subject companies. These would be the obvious commercial consequences of which I would take judicial notice of. It was rightly submitted by Madam Maidzuara Mohammed that the present suit and the uncertainty of its effects, upon judgment, on the business endeavours of the defendants as well as its limiting effects on such endeavours, is sufficient in itself for the court to infer hardship with the natural consequence of financial loss to the defendants.

The Plaintiff's Objections To Encl. 50

Mr. Justin Voon for the plaintiff contended that the defendants' application in encl. 50 was misplaced. He submitted that there was an outstanding application against the defendants in encl. 61 wherein the defendants were supposed to provide further answers to the plaintiff's interrogatories. But Madam Maidzuara Mohammed pointed out that the plaintiff had previously administered interrogatories against the individual defendants and the subject companies on 23 August 2001 as seen in encls. 23 and 24. According to her there were a total of 357 interrogatories, spanning across a total of 168 pages administered against the defendants. She submitted that the replies by the defendants were equally voluminous. She emphasised that the defendants have timeously provided their answers to these interrogatories by their respective answers to the interrogatories dated 21 September 2001 as seen in encls. 27 to 30 and, according to her, these answers run up to a total of 185 pages containing the English translations only. She submitted that the defendants did, as they were legally entitled to, object to some of the questions raised therein – see para. 5(e) of encl. 54, and para. 8 of encl. 55. She paraphrased the main grounds of objections by the defendants in these words:

(a) that there was failure on the part of the plaintiff to particularise its claim sufficiently thereby resulting in most of its interrogatories not having any relation to the matters in issue between the parties;

(b) that the plaintiff adopted the mechanism of interrogatories as a "fishing exercise" in order to perfect its defective pleadings; and

(c) that the plaintiff utilised the mechanism of interrogatories in a harsh and oppressive manner thereby imposing an unreasonable burden on the defendants.

Madam Maidzuara Mohammed submitted at length and rather meticulously that it was not surprising that a period of almost a year has elapsed as a result of these interrogatories. She lamented that time was put to waste and that more time is now at risk of being spent as a result of the plaintiff's application in

encl. 61. So she submitted that in view of the plaintiff's unreasonable and misplaced use of the mechanism of interrogatories, encl. 61 ought not to be considered as a sufficient reason to prevent an order in terms of encl. 50.

Thus far, I wholeheartedly agree with the submissions of Madam Maidzuara Mohammed, the learned counsel for the defendants.

She then ventured to refer to the case of *Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor (supra)* and she said that that case should only be taken as authority for the proposition that interlocutory applications are to be considered necessary and important in the administration of justice when recourse to them is not abusive or oppressive or intended to have such an effect by the party attempting to have the said recourse. In regard to the case of *Dr. Soo Fook Mun v. Foo Fio Na & Anor and Another Appeal* [2001] 2 CLJ 457, a decision of the Court of Appeal with a coram of Gopal Sri Ram and Haidar JJCA and Azmel J, she said that that case is distinguishable on the ground that the applicant there was not given a chance to be heard on his application which resulted in there being no determination and hence not even an opportunity of appeal. Whereas in the present case at hand, so submitted Madam Maidzuara Mohammed, the plaintiff had been given the opportunity to serve interrogatories but it had, much to the dismay of the defendants, used it in a harsh and oppressive manner. Therefore, according to her, the plaintiff's use of the mechanism of interrogatories has, instead of achieving the objectives of O. 26 of the RHC and Practice Note No: 2 of 1977, defeated it. Order 26 of the RHC is generally on interrogatories while Practice Note No: 2 of 1977 is a practice direction emanating from the Acting Chief Registrar and it is worded in this way:

JUDICIAL DEPARTMENT, MALAYSIA
PRACTICE NOTE NO. 2 OF 1977

FIXING OF CASES

1. I am directed by the Hon'ble the Chief Justice to advise that from a survey into the reasons for a large number of cases not proceeding on the dates fixed for their hearing, it has been discovered that in a very great majority of such cases, such cases were just not ready for hearing by reason of some failure on the part of the solicitors concerned in getting the cases ready for hearing. In particular pre-trial procedures provided by the Rules of the Supreme Court which have clearly been devised for the speedy disposal of civil cases by the elimination of extraneous matters and by limiting evidence to the essential matters in issue have, to say the least, been more conspicuous by their absence than by their adoption.

2. In order to facilitate the conduct of cases both for the parties and their counsel as well as for the Judges, the attention of the Bar is drawn to the following minimal provisions:

   i. Order 30 Rule 1, especially sub-rule (b) and (c)
   It should be the duty of solicitors having the conduct of the case to ensure that discovery and inspection of documents will have been made in the time specified. Where a solicitor defaults, the other party should immediately after the expiry of the time specified, file an application for compliance, under Order 31 rule 12. If a party refuses inspection, the other party can go before the Judge on an application under Order 31 Rule 15. The order will, in the absence of any acceptable explanation, be made and the defaulting party condemned in costs. It should be emphasised that in a suitable case, the defaulting solicitor may be ordered to pay the costs of the application personally. See also Order 31 Rules 22 & 23.

   ii. Order 31 Rule 13: Affidavit of Documents
   Solicitors should as a rule file their party's affidavit of documents immediately or shortly after the pleadings have closed. Otherwise they face an application under Order 30 Rule 1 and an order for costs.

   iii. Bundle of Documents
   Immediately after the affidavits of documents from both sides have been filed, whether as the result of due compliance by the solicitors or under an order of court, and after such inspection of the documents as is deemed necessary, the solicitor having the conduct of the case, generally the solicitor for the plaintiff, shall request the co-operation of the other side and prepare and file the relevant Bundle or Bundles of Documents. All documents agreed by either side as not to require proof of their existence will be put in a bundle in order of date and the Bundle marked 'Bundle of Documents Agreed'.

All other documents are to be put in another bundle, similarly in chronological order and marked 'Bundle of Documents not agreed'

This sentence deleted *vide* amendment in Practice Note 4 of 1977

In this connection, attention is drawn to Practice Note 1 of 1969 with regard to an Agreed Bundle of Documents and an Agreed Statement of Facts in Running Down Claims, the Reminder in Practice Note No. 2 of 1971, and the extension to all cases in Practice Note No. 3 of 1970 (as amended by Practice Note No. 1 of 1977) which are still in force and will be applied by the Registry in all Courts.

Two sets of each shall be filed in the Registry. The other party shall be served with one of the Bundles each.

It will make for willing compliance if solicitors and counsel concede or realise that agreeing on documents implies merely dispensation with proof of their existence or execution and does not dispense with proof the averments or allegation therein, unless agreed to on the pleadings or in other admission.

3. Other useful pre-trial procedures; which should be more fully made use of are:

a) Order 31 Rules 1, 2, 8 & 11 Interrogatories, and

b) Order 32 Rules 1, 2, 4 Admissions of facts and documents.

It ought to be realised that resort to such procedures will limit the issues between the parties and cut down the time for the oral evidence that needs to be adduced at the trial.

4. Solicitors entering a case for trial are also required to supply to the Court a copy of the writ of summons and the pleadings or the issue or special case: Order 36 Rule 30. In supplying this copy for the Judge's use, the formal parts of the writ or the pleadings which are of no importance in the understanding of what the case is about, can be safely left out.

5. I am now directed by the Hon'ble The Chief Justice to state that with effect from the date of this Practice Note, no cases will be set down for trial unless at the time of setting down the relevant Bundle of Documents are filed and no cases will be fixed for hearing and no applications for an early date will be entertained until and unless there has been compliance with the minimal requirements listed in paragraph 2 above.

ABDUL HAMID B. HAJI MOHAMED
AG. CHIEF REGISTRAR
8TH DAY OF FEBRUARY, 1972.

But Mr. Justin Voon submitted that during the previous three pre-trial case managements – that would be on 18 September 2001, 21 November 2001 and 10 December 2001, the defendants were represented by their counsel and no application whatsoever was made by the defendants, at the material time, for an early trial. In rebuttal, Madam Maidzuara Mohammed replied and she said that the defendants are not estopped from applying for early trial dates merely because they did not raise the issue of an early trial date at the previous three pre-trial management dates. She submitted that an inference cannot fairly be drawn that the plaintiff was influenced by the defendants' conduct so that it

would now be unconscionable, inequitable and unjust for the defendants to apply for early trial dates. At any rate, according to Madam Maidzuara Mohammed, the plaintiff's unconscionable conduct in using the mechanism of interrogatories in an oppressive, abusive and harsh manner would have the effect of releasing the defendants from the grip of the alleged estoppel, if any. For this proposition she cited the case of *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565, FC. Under Held (4) at p. 567 to p. 568 of the report, it is stated as follows:

> (4) (Per Gopal Sri Ram JCA). In the context of litigation, the doctrine of estoppel usually arises where a party to an action has at least two alternatives and mutually exclusive courses open to him if by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other; he may, if the circumstances so warrant, be precluded from later changing course. The plaintiffs in this case were guilty of unconscionable conduct and this had the effect of releasing the defendants from any estoppel that might have held them in its grip. Once thus released, the parties were placed on an equal footing *viz-a-viz* the litigation. Thereafter, it was open to the defendants to pursue any and all courses made available to them by adjectival law to rid themselves of the offending judgment. Therefore, the learned judge was correct in setting aside the whole of the judgment in default obtained by the plaintiffs on 2 December 1991 (see pp. 583 D and 586H-I).

I would, with respect, hold that the plaintiff's objections to encl. 50 should not be acceded to. The submissions of Mr. Justin Voon for the plaintiff were devoid of merits and they must fall like a deck of cards.

The Plaintiff's Attempt At Striking Out An Averment That Appears In Encl. 58

By way of para. 5 of encl. 59, the plaintiff is seeking the leave of this court to strike out an averment in para. 7 of encl. 58 on the grounds that they are untrue and scandalous. The averment which the plaintiff seeks to strike out reads as follows:

> ... it is the plaintiff who has been orchestrating the conduct of the case from its commencement thus far by filing the various interlocutory applications …

The law is quite clear on this matter. The court will only strike out a matter that is scandalous, irrelevant and/or otherwise oppressive. The court will not strike out a matter which is scandalous but not irrelevant, nor would the court strike out a matter which is irrelevant, but not scandalous. Order 41 r. 6 of the RHC reads as follows:

6. Scandalous etc, matter in affidavits (O. 41 r. 6)

The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

Thus, insulting remarks and offensive language should not find its way in an affidavit. The affidavit too must be free from scandalous or oppressive matter. The court is empowered to strike out the offending part or parts of the affidavit if there is a failure to comply with this rule (*Osmaston v. Assn of Land Finances* [1878] WN 101; *Kernick v. Kernick* [1864] 12 WR 335; *Goddard v. Parr* [1855] 24 LJ Ch 783; *Cracknall v. Janson* [1879] 11 ChD 1; *Rossage v. Rossage* [1960] 1 WLR 249; and *MUI Bank v. Alkner Investments (Pte) Ltd* [1990] 3 MLJ 385).

Should I strike out the averment as reproduced above? In my judgment, that averment is relevant and it is not scandalous at all. Neither is it oppressive in nature. The defendants' application in encl. 50 is simply to set down the action herein for an early trial and so the conduct of the plaintiff as alluded to in the averment as reproduced above would be highly relevant in this regard. So, I refuse to strike out that averment and I let that averment to remain in the affidavit.

It is germane to mention that Mr. K.S. Law for the second, fifth, sixth and seventh defendants – the other defendants, agreed with the submissions of Madam Maidzuara Mohammed in regard to encl. 50. It was an exercise of total subservience.

Conclusion

For the reasons as adumbrated above, I gave an order in terms of encl. 50 particularly prayers (1) and (2) thereof.